No. 95-315

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

U S WEST, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN RESPONSE

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QUESTION PRESENTED

Whether 47 U.S.C. 533(b), which prohibits local telephone companies from providing cable television service in their telephone service areas, violates the First Amendment.

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RESPONDENTS' BRIEF IN RESPONSE

STATEMENT

The issue in these cases is whether 47 U.S.C. 533(b), which bars telephone companies and their affiliates from providing cable television service in their telephone service areas, abridges respondents' freedom of speech and press in violation of the First Amendment. As noted by petitioners, the First Amendment issues presented here are identical to those presented in *United States v. Chesapeake & Potomac Telephone Co.*, cert. granted, No. 94-1893

(June 26, 1995) and *National Cable Television Association v. Bell Atlantic Corporation*, cert. granted, No. 94-1900 (June 26, 1955).

1. U S WEST Proceedings

a. *District Court Proceedings.* Respondents U S WEST, Inc. and its affiliates [1] brought suit to establish their right to provide cable television service within their 14-state telephone service area. The Washington Independent Telephone Association (WITA) intervened to establish similar rights on behalf of its member telephone companies operating in the State of Washington.[2] Pacific Telecom, Inc. and its subsidiaries also intervened as parties plaintiff. On cross motions for summary judgment, the district court ruled that section 533(b) violates the First Amendment and granted summary judgment for U S WEST.

The district court first selected the appropriate level of judicial scrutiny. Noting that "video programing" is a form of protected speech, the court ruled that "[s]ection 533(b) directly abridges plaintiffs' right to express themselves by prohibiting them from engaging in video programming." Pet. App. 48a. It held that heightened First Amendment scru-

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[1] Respondents U S WEST Communications, Inc. and U S WEST Multimedia Communications, Inc. are wholly owned subsidiaries of respondent U S WEST, Inc., a Colorado corporation. We refer to all three respondents collectively as "U S WEST."

[2] GTE Northwest Incorporated, one of WITA's members, opted out of the proceeding because of the involvement of its affiliates in a similar case, *GTE California, Inc. v. FCC*, 39 F.3d 940 (9th Cir. 1994).

tiny was therefore required, rejecting the Government's contention that section 533(b) is mere "economic legislation" that deserves only rational basis review. Pet. App. 48a. Instead of choosing between strict and intermediate scrutiny, the court subjected section 533(b) to intermediate scrutiny as developed in *United States v. O'Brien*, 391 U.S. 367 (1968), and later cases, explaining that section 533(b) "would, *a fortiori*, fail [the] more stringent [strict scrutiny] test" if it could not survive intermediate scrutiny. Pet. App. 50a.

The court focused on whether section 533(b) is "'narrowly tailored to serve a significant governmental interest.'" Pet. App. 48a (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). It noted that "the cable industry has undergone radical changes and developments" in the years since the video programming ban was adopted and set its task as deciding whether, "in light of present circumstances," the Government could "justify [the statute's] sweeping exclusion of plaintiffs from video programming activity." Pet. App. 50a. The court concluded that, "based on the evidence submitted, it appears that § 533(b) does not actually serve the interests it allegedly advances." Pet. App. 55a. The court added, "and if it does serve these objectives, it does so in a manner that sacrifices the First Amendment rights of plaintiffs." Pet. App. 55a. The court found that the record revealed "numerous alternatives to the complete prohibition, which would serve to advance and accomplish the same procompetitive goals advanced by the [Government] in this case, while not eliminating an important speech and press opportunity. Pet. App. 55a. Because the court found

that section 533(b) failed the *O'Brien* test, it did not determine whether strict scrutiny was appropriate.

b. *Court of Appeals Proceedings.* The court of appeals affirmed. Citing this Court's opinion in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), the court found that section 533(b) "burdens U S West's First Amendment rights by expressly prohibiting the company from directly engaging in [protected] speech within a certain area." Pet. App. 10a. Like the district court, the court of appeals rejected the Government's argument that rational basis review was appropriate for consideration of section 533(b)'s constitutionality. Pet. App. 12a. It also rejected the application of strict scrutiny, Pet. App. 16a, and applied intermediate scrutiny. Pet. App. 17a. Accordingly, the court turned to the questions whether section 533(b): (1) furthers an important or substantial government interest; (2) is sufficiently narrowly tailored; and (3) leaves open ample alternative channels of communications. Pet. App. 17a.

The court rejected the Government's arguments that section 533(b) serves an important or substantial government purpose either because it supposedly encourages cable company access to utility poles and conduits or because its cross-ownership bar allegedly promotes "diversity in the cable industry." Pet. App. 21a-25a. Describing it as a "close question," Pet. App. 20a, however, the court found that the Government had "submitted sufficient evidence to create an issue of fact as to whether § 533(b) promotes competition in the cable industry by reducing incentives to cross-subsidize." Pet. App. 26a.

But that finding was "immaterial" to the court's decision, because the court held that section 533(b) is not sufficiently narrowly tailored to withstand intermediate scrutiny. Pet. App. 27a-31a. The court noted that U S WEST "had submitted substantial evidence tending to show that the procompetitive goals of § 533(b) can currently be achieved through a variety of less speech-restrictive means" and that the Government had submitted no "probative evidence to the contrary." Pet. App. 28a. The court therefore held that the Government had not shown that "existing or potential nonstructural rules are so ineffective as to justify a sweeping ban on speech as the only alternative." Pet. App. 29a. In light of its holding that section 533(b) is not narrowly tailored, the court found it unnecessary to decide whether the statute leaves open "ample alternative channels of communication." Pet. App. 31a. The Government's petition for rehearing was denied.

2. Pacific Telesis Proceedings

a. *District Court Proceedings.* Respondents Pacific Telesis Group and its affiliates[3] brought suit to enjoin enforcement of 47 U.S.C. § 533(b), which prohibits them from providing video programming over their existing telephone network.

Pacific Telesis and the present petitioners initially agreed to expedited discovery and briefing of cross-motions for summary judgment. However, on April 15, 1994, the district court stayed proceedings (at the request of petitioners) pending the Ninth Circuit's

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[3] Respondents Pacific Bell and Nevada Bell are wholly owned subsidiaries of respondent Pacific Telesis Group. We refer to all three respondents collectively as "Pacific Telesis."

disposition of *GTE California Inc. v. FCC*, which appeared possibly to present the constitutionality of Section 533(b). On April 20, 1994, Pacific Telesis filed a motion for a preliminary injunction (to afford them relief while the *GTE* case was pending), which the district court denied. The court did not rely on the traditional criteria governing preliminary relief; instead, it held that the stay of proceedings precluded the imposition of a temporary injunction. Pet. App. 58a. Pacific Telesis appealed, and while that appeal was pending, the *GTE* case was resolved without addressing the constitutionality of Section 533(b).

b. *Court of Appeals Proceedings.* After consolidating Pacific Telesis' appeal with the *U S WEST* case for oral argument, the Ninth Circuit reversed. Citing its decision in *U S WEST*, Pet. App. 1a, the court held that Section 553(b) "violates the First Amendment." Pet. App. 34a. It therefore reversed the district court's order denying plaintiffs' motion for a preliminary injunction.

ARGUMENT

The petition presents the same issue that is presented in *United States v. Chesapeake & Potomac Telephone Co.*, cert. granted, No. 94-1893 (June 26, 1995), and *National Cable Television Association v. Bell Atlantic Corporation*, cert. granted, No. 94-1900 (June 26, 1995). We agree with petitioners that the issue presented merits review in this Court, and that the Court should hold the present petition and dispose of it in light of the decision in Nos. 94-1893 and 1900.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision of the Court in *United States v. Chesapeake & Potomac Telephone Co.*, No. 94-1893, and *National Cable Television Association v. Bell Atlantic Corporation*, No. 94-1900, and then disposed of as is appropriate in light of those cases.

Respectfully submitted,

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APPENDIX

APPENDIX

List of Parent Companies and Subsidiaries Pursuant to Supreme Court Rule 29.1

U S WEST

Respondents U S WEST Communications, Inc. and U S WEST Multimedia Communications, Inc. are wholly owned subsidiaries of respondent U S WEST, Inc., a Colorado corporation. U S WEST, Inc. has no parent companies. It has the following non-wholly owned subsidiaries:

Arizona RSA L.P.-Coconino (AZ2); Arizona RSA L.P.-Yuma (AZ4); Atlantic West B.V.; Avon Cable Joint Venture (UK); Avon Cable Limited Partnership (UK); B-Side Carriers Limited Partnership; B-Side Corporation; Baykalwestcom; Beta Prime West Limited Partnership; Bet Primetech Limited Partnership; BetaWest C S Warehouse Partners Ventur; Colorado RSA No. 3 Limited Partnership (CO3); Commercial Reinsurance Company; Delta Telecommunications Company; Des Moines MSA General Partnership; Development Block Corporation; Dontelecom; Dulles Corner Association, Inc.; Dulles Corner Properties I Limited Partnership; Dulles Corner Properties II Limited Partnership; Duluth MSA Limited Partnership; Edinburgh Cable Limited Partnership; Estuaries Cable Limited Partnership; Eurotel Bratalava Spol S.R.O.; Eurotel Praha Spol S.R.O.; Forest Rental Services, Ltd.; FTWEST Telepaiement SA; Gila River Cellular General Partnership (AZ5); Grays Harbor-Mason Cellular L.P. (WA4); Hill Cleaning Services, Ltd.; Hill Enterprises, Ltd.; Idaho RSA 3 Limited Partnership (ID3); Idaho RSA No. 1 Limited Partnership (ID1); Idaho RSA No. 2 Limited Partnership (ID2); IGC

Ltd., IL5 (consolidated w/Illinois SMSA); Illinois Four Limited Partnership (IL4); Illinois RSA 6 & 7 L.P. (IL6); Illinois RSA 6 & 7 Limited Partnership (IL7); Illinois SMSA Limited Partnership; Illinois Valley Cellular RSA 2-III L.P. (IL2); Iowa RSA No. 10 General Partnership (IA10); Iowa RSA No. 2 Limited Partnership (IA2); Kabelcom Holding Co.; Lake Building Services, Ltd.; Lintel; LOCALTouch Brand Company; LOCALTouch Directory Services, Inc.; Lyonnaise Communications; Mercury Personal Communications P/S; Mercury Personal Communications, Ltd.; Mobile Radio Corporation; Mohave Cellular Limited Partnership (AZ1); Moscow Cellular Communications; MPB Limited Partnership; New Mexico 4-Santa Fe RSA West L.P. (NM4W); New Mexico RSA 1-San Juan L.P. (NM1); North Dakota RSA No. 3 L.P. (ND3); Olympia Cellular Limited Partnership; Omaha Cellular Telephone Company; Opplysningakortarot for Nseringeliv; Peak Maintenance Services; Ltd.; PruBeta I; PruBeta II; PruBeta III; Ptarmigan Equity Limited; Ptarmigan Place Co. Tenancy; REL Development; Riverbend West Association, Inc.; Rostelcom; RSA 1 Limited Partnership (IA1); RSA 11 Limited Partnership (IA11); RSA 7 Limited Partnership (IA7); Russian Telecommunications Asset Management Corporation; Russian Telecommunications Development Corporation; Russian Telecommunications Development Holding Corporation; Russian Telecommunications Development Management Corporation; Seattle SMA Limited Partnership; Taihua Golden Triangle Investors, L.L.C.; TCI/ U S WEST Cable Communications Group P/S; Telewest Europe Group; Thomson Directories 1970 Pension; Thomson Directories Ltd.; Thomson Sales & Services, Ltd.; Training Partnership, Inc.; TU-KA

Cellular Tokyo, Inc.; TuCell Limited Partnership; Tver Cellular Communications; Tyneside Cable Limited Partnership; UCI Enterprises, Inc.; United Artists Communications (London S) PLC; United Artists Communications (North East) Partnership (UK); United Artists Communications (North Thames Estuaries) Ltd.; United Artists Communications (Scotland) Limited; United Artists Communications (Scotland) Venture; United Artists Communications (South East) Partnership; United Artists Communications (South Thames Estuaries) Ltd.; United Cable (London South) Limited Partnership; United Communications International; United Telecom; United Telecom Bashkortostan; United Telecom Far East; United Telecom Nizhnii Novgorod; United Telecom Pacific; United Telecom Ural; Uralwestcom; U S WEST (India) Private Limited; U S WEST 123 Limited; U S WEST Services, Ltd.; Wasatch Utah No. 2 L.P. (UT2); WESTEL 900 GSM Mobile Telecommunications Company Ltd.; Westel Radiotelefon Kft., Westelcom.

PACIFIC TELESIS GROUP, PACIFIC BELL, AND NEVADA BELL

Respondents Pacific Bell and Nevada Bell are wholly-owned subsidiaries of respondent Pacific Telesis Group. Pacific Telesis Group does not have any parent companies or subsidiaries other than wholly-owned subsidiaries.

PACIFIC TELECOM, INC. AND SUBSIDIARIES

As of September 19, 1995, Respondent Pacific Telecom, Inc. is approximately 86.6% owned by Pacificorp. All of Pacific Telecom, Inc.'s subsidiaries are wholly-owned except the following: Gem State Utili-

ties Corporation (96%); Northwestern Telephone Systems, Inc. (99%) and Pacific Telecom Cable, Inc. (80%).

WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION

WITA is a Washington non-profit corporation that has no parents or subsidiaries.